

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ROBERT A. BISOM,)	CIVIL ACTION NO. 96-1320
)	
Plaintiff,)	
)	
vs.)	
)	
COMMONWEALTH OF THE NORTHERN)	DECISION AND ORDER
MARIANA ISLANDS,)	
ROBERT D. BRADSHAW, in his official and)	
individual capacity,)	
SCOTT CHANG SANG TAN, in his official and)	
individual capacity,)	
)	
Defendants.)	
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I. PROCEDURAL BACKGROUND

Pursuant to stipulation, the Defendants’ Motion to Dismiss for Lack of Personal Jurisdiction and Failure to State a Claim *and* Defendants’ Motion for a More Definite Statement have been submitted on the pleadings for decision. The parties also submitted additional written argument on the issue of whether Plaintiff, as an attorney for the Public Auditor with Excepted Service Employee status, is entitled to the protections afforded by the Civil Service System.

The Court, having considered the written arguments of counsel, and the record herein, now rules on Defendants’ motions as follows:

FOR PUBLICATION

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II. STANDARD OF REVIEW

In ruling upon a Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the trial court must take the well-pleaded facts alleged in the

complaint as true and admitted. *Govendo v. Marianas Public Land Corp.* 2 N.M.I. 485, 490 (1992). The Court must also “draw reasonable inferences from the allegations” in the complaint. *In re Adoption of Magofna*, 1 N.M.I. 449, 454 (1990). However, “there is no duty to strain to find inferences favorable to the nonmoving party.” *Id.* The burden is on the moving party to prove that as a matter of law no claim exists. *See, e.g., Govendo, supra*, at 490; *Sazerac Co. Inc. v. Falk*, 861 F.Supp. 253 (D.C.N.Y. 1994).

III. DISCUSSION

Defendants seek dismissal of several causes of action from Plaintiff’s complaint. The Court will address each argument raised by the Defendants in sequential order:

1. Motion To Dismiss Third Cause Of Action For Failure To State A Claim For Violation Of Procedural Due Process.

Plaintiff alleges in his third cause of action, violations of his right to procedural due process under Article I, Section 6 of the Constitution of the Commonwealth of the Northern Mariana Islands (“CNMI Constitution”).¹ Defendants move to dismiss this claim on the grounds that Plaintiff was not a member of the Civil Service System and, as such, “[t]he provisions of the personal Service System Rules and Regulations for the Executive Branch, which provide certain notice and procedural protections to Civil Service employees, did not apply to plaintiff.” *See Defendants’ Motion to Dismiss* at 2.

Article XX of the CNMI Constitution provides, inter alia, that “[e]xemption from the civil service shall be as provided by law, and the commission shall be the sole authority [p. 3] authorized by law to exempt positions from civil service classification.” The CNMI Supreme Court, relying on legislative history from the Second Constitutional Convention, has interpreted this language to mean that “only if the legislature passes a law providing for exemptions may there be exemptions from the civil service system. Only the legislature can exempt government employees from the civil service system.”

¹ Initially, Plaintiff conceded that the Court should dismiss this claim with prejudice. *See Plaintiff’s Opposition to Motion to Dismiss* at 1-2. Plaintiff now contends that he was covered by the Civil Service Act and, as such, he is entitled to its protection and “does have a viable claim for violations of his rights to due process.” *See Plaintiff’s Brief Re Coverage Under Civil Service System* at 2-5.

Manglona v. Civil Serv. Comm'n, 3 N.M.I. 244, 249 (1992).²

In response to the foregoing constitutional mandate, the CNMI legislature enacted 1 CMC, Division 8, Chapter 3. 1 CMC §8131(a) states: "Except as provided in this section, the Civil Service System shall apply to all employees of and positions in the Commonwealth government now existing or hereafter established." This provision then exempts twelve (12) separate and distinct positions from the Civil Service System. A cursory examination reveals that the only possible exemptions that could conceivably apply to Plaintiff here are 1 CMC §8131(a)(2) and 1 CMC §8131(a)(7).

The first exemption reads:

Persons or organizations retained by contract where the Personnel Office has certified that the service to be performed is special or unique and non-permanent, is essential to the public interest, and that because of the degree of expertise or special knowledge required and the nature of the services to be performed, it would not be practical to obtain personnel to perform such service through normal public service recruitment procedures.

1 CMC §8131(a)(2). This category requires that the position be "non-permanent." The term "permanent" is defined as a position "which is authorized to continue longer than one (1) year." See, Part III, Sub-part B.2, PSSRR. Because plaintiff's contract was for two (2) years, he does not fall into this exemption category.

The second exemption provides: "Positions specifically exempted by any other law of the Commonwealth." 1 CMC §8131(a)(7). The statute that covers staffing of the Public Auditor's Office is 1 CMC §2305(a) and it reads: [p. 4]

Pursuant to applicable civil service laws and regulations, the Public Auditor may appoint and remove those employees as he or she deems necessary to perform the duties of the office. These employees may include assistant public auditors, accountants, auditors, financial management analysts, investigators, attorneys, paralegals, secretaries, and clerks and the Public Auditor may determine their salaries and duties consistent with civil service laws and regulations. The total amount of all such salaries shall not exceed the funds available to the Public Auditor.

1 CMC §2305(a) (emphasis added). It is undisputed that Plaintiff here was hired under a contract labeled "Excepted Service Employment Contract." See *Exhibit "A", Plaintiff's Second Amended Complaint*. Plaintiff argues, however, that the "Excepted Service Employment Contract" caption does not preclude him from the procedural due process rights afforded to Commonwealth's Government

² In a somewhat different context, this conclusion has been reiterated by the CNMI Supreme Court in *Sonoda v. Cabre ra*, (Certified Question No. 96-001, USDC Civil Action No. 96-0012, April 29, 1997).

employees under the Personnel Service System Rules and Regulations (“PSSRR”). See *Plaintiff’s Brief Re Coverage Under Civil Service System* at 2-5.

The United States District Court for the Northern Mariana Islands visited a similar issue in *Olopai-Taitano v. Guerrero*, (USDC Civil Action No. 93-0019, October 13, 1994). In *Olopai-Taitano*, the plaintiff was hired as the Administrator of the Division of Youth Services. *Id.* at 1. Plaintiff’s Contract was designated an “Excepted Service Contract.” *Id.* at 3. In her complaint, Plaintiff argued, inter alia, that the due process rights afforded to her under the Civil Service System had been violated when she was terminated. *Id.* at 1.

The District Court agreed. In addressing Defendants’ argument that Olopai-Taitano was not entitled to the protections afforded by the Civil Service System, the Court first noted that Olopai-Taitano’s position was a permanent position expressly created under 1 CMC § 2371, and not on the list of exempt positions set forth in 1 CMC § 8131(a). Second, the District Court noted that “the CNMI Excepted Service Personnel Regulations provide that excepted service contracts shall only be used for employees who are listed as exempt for the Civil Service System by 1 Commonwealth Code § 8131.” *Id.* at 3. Thus, because Plaintiff’s position was a permanent position and not specifically exempt from the Civil Service System under 1 CMC § 8131(a), the District Court concluded that, in spite of the Excepted Service contract, “Plaintiff was entitled to the due process protections set forth in the CNMI Personnel Regulations for civil service [p. 5] employees.” *Olopai-Taitano* at 4.

This Court agrees with and hereby adopts the reasoning of the *Olopai-Taitano* Court. Defendants here have produced no evidence to establish that the position of Legal Counsel to the Office of the Public Auditor was a “non-permanent” position as required by 1 CMC §8131 (a)(2). Defendants failed to carry their burden in establishing that, as a matter of law, Plaintiff’s claim is without merit. Plaintiff does have a constitutionally protected property right which, as claimed in paragraph 28 of the Second Amended Complaint, was violated by Defendant’s failure “to give plaintiff proper notice and an opportunity to be heard to contest the adverse personnel action.”³ Accordingly, Defendants’ motion to dismiss Plaintiff’s claim for violation of procedural due process in the third cause of action is DENIED.

³ See, Article I, Section 5, CNMI Constitution; Article XIV, Section 1, U.S. Constitution; *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Batson v. Geisse*, 857 F.2d 1300, 1305 (9th Cir. 1988); *Christian v. Cecil County*, 817 F. Supp. 1279 (D.Md. 1993).

2. Motion To Dismiss Fifth Cause Of Action On The Ground That The CNMI Is Immune From Suits Arising From The Intentional Torts Of Its Employees.

_____ Defendants concede that the cause of action for implied covenant of good faith and fair dealing is contractual and not tortuous. See Defendants' Reply to Plaintiff's Opposition at 1. Contract causes of action against the CNMI are generally allowed pursuant to 7 CMC § 2251(b). For these reasons, Defendants' motion to dismiss the fifth cause of action on the ground that the CNMI is immune from suits arising from the intentional torts of its employees is DENIED.

3. Motion To Dismiss Sixth Cause Of Action For Intentional Infliction Of Emotional Distress Against Defendant Bradshaw.

_____ To establish the cause of action for intentional infliction of emotional distress, a plaintiff must show that the conduct complained of (1) was extreme and outrageous; (2) was intentional or reckless; (3) caused emotional distress; and (4) caused severe distress. *Arriola v. Insurance Co. Of N.Am*, 2 CR 113, 121 (N.M.I. Trial Ct. 1985).

In his Complaint, Plaintiff alleges that during a one month period he: [p. 6]

- A. had the keys to his office and government car confiscated;
- B. was forced to obtain Bradshaw's prior consent before receiving or making telephone calls;
- C. was told that he could not leave his office without Bradshaw's prior consent;
- D. was denied permission to go to Guam for medical reasons;
- E. had approval for annual leave retracted;
- F. was forced to move his desk into the public hallway;
- G. was threatened to be evicted from his home; and,
- H. was reported to the CNMI bar without cause.

See Second Amended Complaint at 6-8.

Defendant Bradshaw takes the position that none of these acts are sufficient to establish a cause of action for intentional infliction of emotional distress under the RESTATEMENT SECOND OF TORTS.

Motion at 8-10.

The factual circumstances alleged by Plaintiff here for intentional infliction of emotional distress are

sufficient to withstand Defendants' Rule 12(b)(6) motion to dismiss. In so doing, the Court echoes the reasoning expressed by the California Supreme Court in *Molien v. Kaiser Foundation Hospital*:

[T]he jurors are best situated to determine whether and to what extent the defendant's conduct caused emotional distress, by referring to their own experience. In addition, there will doubtless be circumstances in which the alleged emotional injury is susceptible to objective ascertainment by expert medical testimony. To repeat: this is a matter of proof to be presented to the trier of fact. The screening of claims on this basis at the pleading stage is a usurpation of the jury's function.

27 Cal.3d 916, 616 P.2d 813 (1980) (citations omitted) (emphasis added).

Accordingly, Defendant Bradshaw's motion to dismiss the sixth cause of action for intentional infliction of emotional distress is DENIED.

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4. Motion To Dismiss The Eighth Cause Of Action For Violations Of The Civil Service Act.

_____ Plaintiff's eighth cause of action seeks redress against defendant Bradshaw individually for alleged violations of the Civil Service Commission Act, 1 CMC §§ 8145(f) and 8152(b). These sections state as follows:

No public official or employee shall discharge, promote, demote, or, in any manner, change the status or compensation of any other official or employee, or promise or threaten to do so because of the political or religious actions or beliefs of the other official or employee or for the failure of the other official or employee to take any political action for any political purpose whatsoever or to advocate or fail to advocate the candidacy of any person seeking elective office.

1 CMC §8145(f).

It is an offense for any person to cause or threaten to be caused a demotion in rank or civil service classification or position or a decrease in pay or any other benefit, or tenure of employment, of any government employee, with intent to discourage or encourage such government employee to support any candidate for public office, initiative or referendum or political party.

1 CMC § 8152(b).

In his Second Amended Complaint, Plaintiff alleges that Mr. Bradshaw "was appointed as the Temporary Public Auditor" on or about November 25, 1993, approximately three weeks after the November 6, 1993 general election. *Second Amended Complaint, para. 12*. Plaintiff also alleges that "Mr. Bradshaw

did not cause Plaintiff's employment to be terminated for cause until on or before December 28, 1993." *Id.* at 15.

In their motion to dismiss, Defendants argue that 1 CMC § 8152(b) cannot be a basis of recovery because all facts pled in Plaintiff's complaint took place after the November 6, 1993 general election. Motion at 11. According to the Defendants:

Plaintiff does not, and cannot, allege that any actions taken by Mr. Bradshaw were intended to "discourage or encourage" plaintiff "to support any candidate for public office" or political party because the election had already been held and decided before Mr. Bradshaw was appointed Temporary Public Auditor and before Mr. Bradshaw terminated plaintiff.

Id.

Plaintiff counters that Defendants are reading 1 CMC § 8152(b) too narrowly and that [p. 8] because Plaintiff alleges in his complaint that the actions taken against him were politically motivated, even though the actions took place after the general election, that his eighth cause of action should stand. See Opposition to Motion to Dismiss at 9. Plaintiff stresses that a strict reading of 1 CMC § 8152(b) would overly narrow the statute's application and act contrary to the legislature's intent to protect civil employees from political retaliation. *Id.* This Court agrees.

_____ 1 CMC § 8152 is entitled "Coercion of Public Employees for Political Purposes Made Unlawful." It is totally illogical to this Court that the Legislature would prohibit coercion of public employees for political purposes prior to elections, but would implicitly allow coercion of, or retaliation against, public employees for political purposes following elections. See *Dela Cruz v. Hotel Nikko Saipan*, Civil Action No. 91-259 (Super. Ct. July 10, 1995) (Courts are constrained to adopt reasonable interpretations of statutes); See also, *Pierce v Van Dusen*, 78 F. 693, 696 (1897) cited with approval in SUTHERLAND STAT.CONT. § 46.07 (5th Ed.) ("While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and obvious purpose of the law should not be sacrificed to a literal interpretation of such words."). Therefore, Defendants' motion to dismiss the Eighth cause of action for violations of the Civil Service Act is DENIED.

Defendants also move to dismiss the eighth cause of action based on 1 CMC § 8145(f) arguing that "Defendants have been unable to locate any CNMI authority holding that there is a private right of action under 1 CMC § 8145(f)." Motion to Dismiss at 12. Neither party cites any authority on Plaintiff's standing to

sue under 1 CMC § 8145(f).

In order to have standing to maintain an action complaining of the wrongful acts of public officials, a private citizen must aver a special interest or a special injury not common to the public generally. See *Friends of Chamber Music v. Denver*, 696 P.2d 309, 315 (Colo. 1985) (en banc); See also, *Ex parte Levitt*, 302 U.S. 633 (1937) (“When an individual or a private citizen suffers an injury peculiar to himself from a public wrong which is not sustained by the public in general, he may sue in his own name and for his own benefit for such wrong.”). While a failure [p. 9] to perform a duty to the public imposed upon an officer can form the basis of an action, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages. *Northwest Steel Co. v. School Dist.*, 148 P.1134, 1135 (Or. 1915)(en banc).

_____ Because Plaintiff’s complaint alleges causes of actions based on perceived wrongs to his individual rights, i.e., special injury not common to the public generally, he has standing to sue under 1 CMC § 8145(f). Accordingly, Defendants’ motion to dismiss the Eighth cause of action based on 1 CMC § 8145(f) on the theory that Plaintiff has no standing to sue is also DENIED.

5. Motion To Dismiss The Tenth Cause Of Action For Promissory Estoppel.

_____ Defendants move to dismiss Plaintiff’s tenth cause of action for promissory estoppel, arguing that pursuant to 7 CMC § 2204(b), the CNMI has not consented to being sued for promissory estoppel and as such, it has sovereign immunity against such suits.⁴ 7 CMC § 2204(b) provides that the CNMI Government is not liable for:

Any claim arising out of . . . misrepresentation, deceit, or interference with contractual rights.

The doctrine of promissory estoppel requires the presence of four elements: (1) the party to be estopped must be appraised of the facts; (2) he must intend that his conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury. In re Blankenship, 3 N.M.I.

⁴ Defendants also argue that the CNMI’s sovereign immunity extends to Defendant Tan in his official capacity.

209, 214 (1992).⁵

_____ Contrary to Defendants' assertion, promissory estoppel generally does not involve [p. 10] misrepresentation, but involves a promise by one party upon which another relies to his detriment and which the promisor should reasonably have foreseen would cause the promisee to so rely. See, e.g., *Tiffany Inc. v. W.M.K. Transit Mix, Inc.*, 493 P.2d 1220 (1972). Thus, causes of action based on the theory of promissory estoppel need not be based on "misrepresentation or deceit" - the promisor may have had every intent of fulfilling the promise at the time it was made and he may have made his promise based on facts or circumstances which existed at the time the promise was made. For these reasons, Defendants' motion to dismiss the tenth cause of action based on promissory estoppel is hereby DENIED.

6. Motion For A More Definite Statement.

Defendants move, pursuant to Rule 12(e) of the Commonwealth Rules of Civil Procedure, for an order requiring Plaintiff to submit a more definite statement of his claims against Defendant Tan as alleged in the Third and Tenth Causes of Action. Defendants argue that a more definite statement must be made in the complaint so that they can ascertain whether Tan is being sued in his professional or individual capacity. Motion for More Definite Statement at 5-6.

Under similar facts in granting Defendants' motion for a more definitive statement, the Court in *Bower v. Weisman*, 639 F. Supp. 532 (S.D.N.Y. 1986) held: "Obviously, [Defendant] cannot effectively respond to [Plaintiff's] complaint until he knows which claims [Plaintiff] is asserting against him in his individual capacity." Accordingly, Defendants' motion for a more definite statement is therefore GRANTED.

IV. CONCLUSION and ORDER

FOR THE FOREGOING REASONS:

1. Defendants' Motion to Dismiss Plaintiff's claim for violation of procedural due process in the third cause of action is **DENIED**.

⁵ See also, *Blacks Law Dictionary*, 3rd Edition. ("Promissory estoppel is that which arises when there is a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on part of promisee, and which does not induce such action or forbearance and such promise is binding if injustice can be avoided only by enforcement of promise.")

2. Defendants' Motion to Dismiss the fifth cause of action on the grounds that the [p. 11] CNMI is immune from suits arising from the intentional torts of its employees is **DENIED**.

3. Defendants' Motion to Dismiss the sixth cause of action for intentional infliction of emotional distress is **DENIED**.

4. Defendants' Motion to Dismiss the eighth cause of action for violations of the Civil Service Act is **DENIED**.

5. Defendants' Motion to Dismiss the tenth cause of action for promissory estoppel is **DENIED**.

6. Defendants' Motion for a More Definite Statement as to the third cause of action is **GRANTED**.

7. Defendants' Motion for a More Definite Statement as to the tenth cause of action is **GRANTED**.

Within fifteen(15) days of this Order, Plaintiff shall file an amended complaint in conformance with this Decision.

SO ORDERED this 6 day of November, 1998.

/s/ Alexandro C. Castro
ALEXANDRO C. CASTRO, Judge Pro Tem